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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941

No. 119

ADVANCE TRANSPORTATION COMPANY, a corporation,

Petitioner,

vs.

ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER and ALBERT F. WAGNER,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941

No.....

ADVANCE TRANSPORTATION COMPANY, a corporation, Petitioner, vs. ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER and ALBERT F. WAGNER, Respondents.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Petition for Writ of Certiorari

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Now comes your petitioner, Advance Transportation Company, a corporation, defendant-appellant below, and respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the decision of said court rendered in the case of Arthur F. Miller, Thomas G. Foster, Richard J. Browne, Edward J. Shoffner and Albert F. Wagner versus Advance Transportation Company, a corporation, being Case No. 7744 in said Court.

Statement of the Matter Involved.

The respondents seek to recover damages for personal injuries sustained when an automobile in which they were riding ran into and collided with the rear

end of a trailer and tractor owned and operated by your petitioner, which the respondents allege was negligently stopped and parked on a paved portion of the highway. There were originally three suits started in the state courts, one by the respondents, Richard J. Browne, Albert F. Wagner and Edward J. Shoffner (Tr. 2), another by the respondent, Arthur F. Miller (Tr. 23), and the third by the respondent, Thomas G. Foster (Tr. 41). On petitions of your petitioner the causes were removed to the District Court of the United States for the Northern District of Illinois, Eastern Division, where the cases were consolidated (Tr. 58, 63, 67) and tried together. The complaints are identical so far as the charges of negligence are concerned (Tr. 4, 25, 42). There are eight separate charges of negligence set up in separate sub-paragraphs. Five of these charges alleged violation of certain sections of the Motor Vehicle Law of Illinois. The other three charge specific acts of negligence on the part of your petitioner.

Motions were made by your petitioner for directed verdicts and for findings of not guilty as to each of the charges laid in the complaints, both at the close of the respondents' cases (Tr. 286-296) and at the close of all of the evidence (Tr. 470-480). These motions were overruled by the trial court, the cases were submitted to the jury, verdicts were returned in favor of the respondents (Tr. 495-497), and judgments were entered on the verdicts (Tr. 498). Thereafter your petitioner filed its motion for judgments notwithstanding the verdicts (Tr. 499), which the trial court overruled (Tr. 507). The Circuit Court of Appeals has affirmed these judgments (Tr. 528).

The occurrence in question took place shortly after ten o'clock on the evening of April 4, 1939, on Skokie Highway, also known as U. S. Route 41, at a point

thereon north of Tower Road and to the east of the water tower (Tr. 71, 81, 103, 150, 126, 221-223), and within the corporate limits of the Village of Glencoe, Illinois (Tr. 307-309). Skokie Highway is a paved 4-lane highway, 40 feet or more in width, straight and level, and runs in a general northerly and southerly direction. The weather was clear and the pavement was dry (Tr. 92, 104, 225, 248).

Shortly before the occurrence complained of four large trucks of the trailer-tractor type, which had been proceeding along Skokie Highway in a southerly direction, had come to a stop on the southbound or westerly traffic lane of the highway near the scene of the occurrence. The occasion for the stopping of these trucks was that the one furthest to the north and the first to arrive, had pulled almost wholly off the pavement onto the shoulder and, the shoulder being soft, the wheels had sunk down to such an extent that the driver was unable to get it back onto the pavement (Tr. 72). The drivers of these trucks had lighted some fusees and perhaps had set out a few kerosene torches (Tr. 97). Shortly thereafter three trucks belonging to your petitioner arrived from the south, traveling north, and came to a stop in the easterly or outside traffic lane (Tr. 73). When they came to a stop the rear end of your petitioner's truck, which was furthest to the south, was, according to the respondent's proof, 30 to 40 feet to the north of the rear end of the most northerly of the trucks on the opposite side of the highway (Tr. 86). The lights were burning on the rear of your petitioner's trucks (Tr. 80, 88).

Shortly thereafter the car in which the respondents were riding, driven by the respondent, Miller, approached from the south, also traveling in the outside northbound traffic lane. The brakes were applied (Tr.

80), the car proceeded straight ahead (Tr. 150, 175), and collided head-on with the center of the rear of your petitioner's truck. Skid marks left by the car measured 75 feet to the rear (Tr. 124). The speed of the car at the time of the impact was variously estimated by the respondents themselves at 25 miles per hour (Tr. 144, 149), 15 to 18 miles per hour (Tr. 169), and 12 to 20 miles per hour (Tr. 235).

There was no traffic or obstruction in the traffic lanes to the west of your petitioner's truck (Tr. 149, 150). Respondents had 30 or more feet of clear pavement on which to pass this truck, had they been observant.

Basis of Jurisdiction.

This Court has jurisdiction to review said decision under Section 240 of the Judicial Code (28 U. S. C. A. Section 347).

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was rendered in said cause on March 2, 1942. Your petitioner's petition for re-hearing of the said cause was denied by said court on April 6, 1942, making its judgment final as of that date.

Questions Presented.

The questions presented are questions of law and are:

1. Whether or not the trial court erred in refusing to instruct the jury to return verdicts finding your petitioner not guilty and in overruling your petitioner's motion for judgments notwithstanding the verdicts. Your petitioner contends:

(a) That the evidence is insufficient to support the verdicts, and

(b) That there is a fatal variance between the allegations of the respondents' complaints and their proof adduced on the trial.

2. Whether or not the Circuit Court of Appeals has properly applied the law of Illinois to the facts as shown by the evidence. Your petitioner contends:

(a) That under the law of Illinois, the respondents failed to prove their case as alleged in their complaints;

(b) That the Circuit Court of Appeals has misconstrued and misapplied certain statutes of the State of Illinois, the alleged violation of which were relied upon by respondents; and

(c) That the law as laid down in the opinion of the Circuit Court of Appeals is in conflict with that laid down in the opinions of the courts of Illinois.

3. Whether or not the Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the evidence. Your petitioner contends:

(a) That the facts as stated by the Circuit Court of Appeals in its opinion do not disclose the true purport of the evidence, and

(b) That had the Circuit Court of Appeals not overlooked or misapprehended certain of the facts proved by the respondents themselves it would have reversed the judgment of the trial court.

Reasons Relied on for Allowance of the Writ.

The reasons relied on for the allowance of the writ are as follows:

1. The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof and the facts as stated in its opinion do not disclose the true purport of the evidence.

As illustrative of the extent to which the Circuit Court of Appeals overlooked or misapprehended the facts as shown by the proof, your petitioner calls this Court's attention to the following:

(a) In the seventh paragraph of its opinion, after stating that at a point about 300 to 500 feet south of the point of the collision, the respondents noticed the red lights on the west side of the highway, the court states:

> "That after discovering the situation, the speed of the car was reduced to about 10 miles per hour."

In the sixteenth paragraph of its opinion the court makes a similar statement: "The speed of the car was reduced to some 10 or 12 miles per hour." These statements are contrary to the respondents' proof. Their proof shows that the car in which they were riding skidded a distance of 75 feet (Tr. 124), on a dry pavement (Tr. 92, 104, 225, 248), before it was stopped by coming into collision with the defendant's truck and that at the time of the impact, according to their own estimates, was still traveling 25 miles per hour (Tr. 144, 149), 15 to 18 miles per hour (Tr. 168-169), and between 12 and 20 miles per hour (Tr. 235). There is no evidence in the record that the speed of the car was reduced to 10 miles per hour or even 12.

(b) A little further along in the seventh paragraph of its opinion, the court state:

> "The atmosphere was variously described as murky or reddish from the reflection of the fusees, a sort of Indian summer haze, or as a slight smoke or fog."

The existence of this supposed smoke or fog and its apparent density are quite material in considering the question of the exercise of ordinary care on the part of the respondents. It is apparent that the court

overlooked the testimony of the respondent, Miller, the driver of the car in question, that the supposed smoke or fog was so dense that his lights did not illuminate the highway at all and that he would not say that he could see as much as 10 feet ahead of his car (Tr. 274). Also of the respondent, Foster, who was seated in the front seat with Miller, that it was practically impossible to see through the smoke (Tr. 232).

(c) In the eighth paragraph of its opinion the court say:

> "Two matters are seriously controverted: (1) Were there any lights on the rear of the truck with which the plaintiffs' car collided, * * *"

It is respectfully submitted that there could be no controversy about this. The respondents proved by two witnesses that the lights were burning on the rear of the defendant's truck at the time of the occurrence (Tr. 80, 88). Your petitioner's proof was in accord with this and shows conclusively that such was true (Tr. 338, 339, 359, 389, 399, 406, 430, 444). No witness testified that they were not, not even the respondents themselves. The respondents testified that they did not see any such lights, but they did not testify that there were none. The only controversy about the lights was that raised by the respondents in the Circuit Court of Appeals between the testimony of their own witnesses that there were lights on the rear of the truck and what they wished the court to infer from their own testimony that they did not see any lights.

(d) At the beginning of the sixteenth paragraph of its opinion the court say:

> "It is not contended that the plaintiffs were driving at an excessive rate of speed."

It is respectfully submitted that the court, in making this statement, overlooked one of the main contentions

of your petitioner, both in the trial court and on the appeal. The respondents' own proof, it is respectfully submitted, shows that they were. It could hardly be contended that a car which skidded a distance of 75 feet on a dry pavement and was still traveling at a speed up to 25 miles per hour was not being driven at an excessive rate of speed. Furthermore, your petitioner's proof shows that the respondents' car approached the scene of the occurrence at about 70 to 80 miles per hour (Tr. 360), and that at the time it passed the most northerly of the trucks on the opposite side of the highway was still traveling about 60 to 70 miles per hour (Tr. 368). Furthermore, your petitioner's proof shows that instead of skidding 75 feet, it skidded a distance of approximately 200 feet (Tr. 339, 388, 389, 408, 445). Your petitioner did contend both in the trial court and on appeal that the plaintiffs were driving at an excessive rate of speed, and that such excessive speed was the proximate cause of the occurrence.

Other instances in which the court overlooked or misapprehended the facts as shown by the evidence will be brought to the attention of the Court in the brief in support of this petition and annexed hereto.

2. The Circuit Court of Appeals failed to follow the law of Illinois, the state in which the occurrence took place and in which the trial was had, in arriving at its decision, and the law as laid down in the opinion of the court is in conflict with the decisions of the courts of Illinois.

(a) The court, in its opinion, overlooked the well-settled law of Illinois that the burden was on the respondents to prove that at and before the time of the occurrence they were in the exercise of ordinary care for their own safety,—that under the law of Illinois contributory negligence is not an affirmative defense.

(b) The court, in its opinion, overlooked the well-settled law of Illinois that the burden was on the respondents to prove that your petitioner was guilty of the negligence charged in their complaints and that such negligence, if any, was the proximate cause of their injuries.

(c) The court, in its opinion, overlooked the well-settled law of Illinois that liability cannot rest on surmise or conjecture, but must be established by affirmative, positive proof.

(d) The court has, in its opinion, misconstrued Sections 88, 103, 104 and 121 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1941, Chap. 95½, pars. 185, 200, 201 and 218), and has misapplied them to the plaintiffs' proof.

(e) The court was in error in holding that there was no variance between the respondents' proof and the allegations of their complaints.

(f) The law as laid down in the opinion of the Circuit Court of Appeals is in conflict with the law of Illinois as laid down in numerous decisions of the courts of Illinois.

3. That the Circuit Court of Appeals was in error in failing to find from the proof adduced on the trial and under the law of Illinois that the respondents are not entitled to recover.

Prayer.

Wherefore, your petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify to this Court a full and complete transcript of the record and all proceedings had in said Circuit Court of Appeals in this cause entitled, "Arthur F. Miller, Thomas G. Foster, Richard J. Browne, Edward J. Shoffner and

Albert F. Wagner, vs. Advance Transportation Company, a corporation," being Cause No. 7744 in said court, to the end that said cause may be reviewed and determined by this Court, as provided by statute, and that the judgment of the said Circuit Court of Appeals may be reversed by this Court.

Respectfully submitted,

ADVANCE TRANSPORTATION COMPANY,
a corporation, petitioner.
By JOSEPH H. HINSHAW,
Its attorney.

OSWELL G. TREADWAY,
Of Counsel.